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Tuesday, February 12, 2008

Political arguments from extreme examples are extremely bad

In our recent years of paranoia, which we slowly seem to be recovering from, one has often heard arguments that political policies or laws should be changed based on the failure of current policies or laws to address extreme cases. Here's a recent example:

> Suppose you knew for a fact that your family was in imminent danger of being murdered in a plot masterminded by bin Laden or some other homicidal psycho? Suppose, further, that you knew a confession from him would save the lives of your family. Would you be willing to have the authorities use torture to obtain it?

or, if that doesn't make you sufficiently afraid,

> Picture this: There's a guy in police custody who knows the location of a bomb that's set to explode in an elementary school building that holds 500 children. Threats and intimidation have failed to make him reveal the address of the school and the location of the device. You suspect that torture would loosen his tongue and save all those innocent lives. What would you do?

There are several flaws in this argument, one being that we rarely "know for a fact" events that have not happened yet, another being the dubious missing link in the logic here, that the information extracted would be reliable and thus help law enforcement prevent the danger rather than provide them with misinformation that distracts them from the real target. But there is a more basic problem with these kinds of arguments when applied to any argument over what any law should be.

The use of extreme examples preys upon the widespread ignorance in modern societies of how our legal systems work. It assumes that our legal system executes laws as if it were a robot: law goes in, facts go in, defendant goes in, from the legal code and the facts the robot logically concludes that the defendant violated law, defendant goes to jail, period. But that's not how our legal system works. Rather it is set up to assume, properly, that no language can describe just outcomes in all cases. It is set up so that when legal rules cause obvious injustices, those injustices can be avoided. In the United States and Commonwealth countries, at least three different groups can exercise discretion to prevent obvious injustice to technical lawbreakers: prosecutors, grand juries, and trial juries.

In the case of the torturer of an obvious terrorist who in fact saves many lives, it's highly likely that prosecutors would exercise their discretion to not prosecute. They'd get overwhelming political support in doing so. Even if they prosecuted, they would be unlikely to get a grand jury to indict. And even if a grand jury indicted the life-saving torturer, it's extremely unlikely that a trial jury would

About Me

Nick Szabo

"A premier thinker about history, law and economics, and the lessons they have for security." -- Adam Shostack, Emergent Chaos

"Szabo comes out with these essays that leave me in awe." -- Brian Dunbar

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convict. Thus, despite violating the words of the law, our life-saving torturer would be hailed as a hero, get millions of dollars worth of book contracts, and face no serious risk of jail time. Strong anti-torture laws, with no exceptions written in to the language of the law, would prevent the gross injustice and inhumanity of torture in the vast majority of cases where officials would be tempted to torture -- cases where the dangers posed by the torture victim or his pals are more pedestrian or less clear than the extreme scenarios put forth by proponents of legalizing torture. In such cases the importance of not stooping to the barbarity of torture, and the extremely horrific possibility that torture might become standard law enforcement and military practice, should trump uncertain or everyday security considerations. Strong and absolutely worded anti-torture laws would not punish a torturer who clearly saved many lives in the extremely rare circumstances so often portrayed by these proponents.

Posted by Nick Szabo at 5:27 PM

7 comments:

Byrne said...

This sounds a lot like the argument for cheating on your taxes: "Everyone knows everyone does it, so they set up tax rates to compensate for it. Thus, you're *overpaying* if you pay what they ask for." The problem is that a system that says "Don't quite do specifically this" gives lots of leeway, and makes things less predictable than they should be. A legal system can be designed to keep in mind that laws may be broken -- but that doesn't mean we should write laws that we expect to be broken under particular circumstances, rather than writing them to take those circumstances into account. It just makes the world more chaotic -- and makes it more likely that the people who do want to torture are going to do it and justify it with your argument.

9:30 AM

nick said...

That doesn't mean we should write laws that we expect to be broken under particular circumstances, rather than writing them to take those circumstances into account.

Byrne, that's a thoughtful comment, but I can find at least four problems with it:

(1) we usually don't know more than a tiny fraction of what particular rare circumstances need to be accounted for. Trying to account for even the more probable cases gives rise to the vast complexity of our legal code as it exists today. That complexity furthermore provides numerous opportunities for lobbyists to slip in loopholes excepting _their_ circumstance from the law.

(2) There are few actual proposals for specific language to make an exception for the "ticking bomb" exception, and the ones I've seen are far too broad, providing many opportunities for officials to abuse the exception. Here's an exercise -- try actually drafting language to write a "ticking time-bomb" exception into an otherwise absolute ban on torture. You'll find that, whatever language you choose, it will still be full of holes. It will either be hopelessly vague, or it will leave many important terrorist threats unaddressed but at the same time will be too broad, introducing many opportunities for officials to abuse the law by using torture where it there is no urgent and important necessity for it.

(3) It is vague exceptions and complexity that create ignorance of the law and thereby encourage far more lawbreaking than would occur by leaving some rare cases to the discretion of prosecutors and juries.

(4) People usually don't debate politics in terms of finely drawn exceptions. Even on the Congressional floor the debate doesn't go much beyond "allow torture" vs. "ban torture." The "ticking time bomb" exception is in practice usually used to justify very broad uses

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of torture; at the very least it turns into a loophole you can drive a truck through.

5:29 PM

casey said...

@byrne:
Do you think there's a chance that a prosecutor, grand jury, or trial jury would decide not to prosecute, indict, or convict you if you don't pay your taxes?

I don't think this scheme of "distributed justice" sends the message "don't quite do specifically this", rather it implies that if you *really* think you're justified in breaking laws for a public good (like resorting to torture) you're still going to be judged by that public.

5:41 PM

Peter McCluskey said...

Why isn't the necessity defense a better way to handle this?

8:11 AM

nick said...

Peter, that's a very good point, and indeed I'd expect the necessity defense to be the main reason given by prosecutor or jury in exercising their discretion. While the examples given by torture proponents usually satisfy the necessity defense, in fact they want open-ended allowance of torture that goes far beyond any such defense.

2:02 PM

Bart said...

"Extreme Examples Can Be Extremely Important"

When all is said and done, I tend to favor strongly-worded anti-torture legislation without exceptions. But I don't buy some of the arguments you put forward.

Who gets actually prosecuted and convicted is a secondary consideration. The most important function of any such law is as a statement of societal values.

On one end of the bell curve of opinion are those who think torture is wrong, no matter what. It is an absolute moral judgment, and no necessity defense is allowed. Torturing one person to save a billion is just plain wrong. It sounds like no one in this discussion is taking that view.

The rest of us are basically admitting it is an empirical question. If it is reasonable for us to symbolically ban all torture always, it is also reasonable to symbolically acknowledge the possibility of doing whatever it takes to protect us against an extreme event like nuclear explosions killing millions. Aside from the legal necessity defense, we can ask if we are willing to publicly set the stage morally for a necessity defense. You don't have to be pro-torture to wonder about that.

Situations vary in a number of dimensions, including (1) the magnitude of the relative benefit to finding the information, (2) the relative probability that torture will yield that benefit, (3) the degree to which there are less pure motives that can bias one's estimate of the above. In your introduction you argue that (2) is low and uncertain. I agree with you, but it's still an empirical question.

I also think that your portrayal of the fate of a torturer who saves thousands of lives is off base. As Taleb notes in "The Black Swan", if you save people from disaster, it won't be a news story, so you won't be a hero. Action that prevented 9/11 from happening might have barely made the news, since in that case there would have been no 9/11 against which to measure it.

What surely would be a news story is that extremely unlikely (?) but extremely important example of a nuclear explosion killing millions. You can be sure that every hint of a way to prevent it would be analyzed afterwards, and in the court of public opinion someone who did not use torture to try to stop it would be judged guilty. Even as we expect and demand that our law enforcement people refrain from torture, it's worth a bit of sympathy when considering the incentives inherent in their situation. In this case an absolute torture ban could appropriately do a little at least to help this person.

So an absolute torture ban is a good idea, without written exceptions. But it also might be worth noting publicly our willingness to entertain a necessity defense. The standards of proof should be far, far higher than anything we have seen in the Bush administration, but they are still there.

If you want a bit more background on where I am coming from, you can see my own modest part-time "bartfusn.blogspot.com".

6:27 PM

Leonard said...

Hi Nick. I've admired your discussion w/ Moldbug so I am also reading your blog. Very good stuff. Anyway, a late note here to remind you of a 4th party that can exercise discretion to prevent obvious injustice to technical lawbreakers: the executive, using the pardon power.
http://en.wikipedia.org/wiki/Pardon

12:05 PM

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